

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

OCT - 2 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

Interconnection between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers)

CC Docket No. 95-185

COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON THE
FURTHER NOTICE OF PROPOSED RULEMAKING

Genevieve Morelli
Executive Vice President and
General Counsel
THE COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, DC 20036

(202) 296-6650

Robert J. Aamoth
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

(202) 955-9600

October 2, 1997

Hand Carried
10/2/97

076

SUMMARY

Section 251(c)(3) of the Communications Act of 1934, as amended, entitles requesting carriers to use unbundled network elements ("UNEs") purchased from incumbent local exchange carriers ("ILECs") to provide "*any* telecommunications service." The Act contains no requirement that a purchaser of shared or dedicated facilities on a UNE basis must offer local exchange service as a precondition to providing "*any* telecommunications service," including exchange access, using the UNE. Accordingly, the Commission should modify its rules to make clear that a carrier may use shared and dedicated transport facilities purchased on a UNE basis to provide exchange access to other carriers or itself, regardless of whether that carrier provides local exchange service to end-user customers.

Not only would a restriction on such use of transport UNEs related to the provision of local exchange service to end-users be at odds with Section 251(c)(3), it would not be sound public policy. Such a restriction would decrease competition for exchange access services and reduce consumer choice. Moreover, it would be inefficient from a network perspective to require an interexchange carrier's exchange access traffic to be carried over separate trunks depending on whether the carrier was the end-user's local exchange carrier.

Furthermore, such a restriction would discriminate in favor of those IXC's that have moved more quickly into the local exchange market by giving them an artificial cost advantage over their competitors. For legitimate business reasons, some IXC's have chosen to enter fewer and/or smaller local markets than others or none at all, at least for now. These carriers should not be unfairly and artificially penalized for their decisions in the form of higher transport rates relative to their rivals due to regulatory fiat rather than market forces.

A prohibition on using transport UNEs for exchange access unless the carrier also provided the end-user customer local exchange services would also be at odds with the procompetitive policies in the Commission's *Expanded Interconnection* proceeding. There, the FCC has encouraged the provision of access service by providers that were not LECs. Finally, by refusing to impose any restriction on the use of unbundled transport elements on the provision of exchange access, the Commission will further its own objective of economic, cost-based pricing for access services.

Accordingly, the Commission should quickly move to modify its rules to make clear that carriers may use transport facilities purchased on a UNE basis to provide exchange access service to other carriers or themselves, regardless of whether they also provide local exchange services. Such an action would be consistent with both prior FCC decisions and the recent opinions of the U.S. Court of Appeals for the Eighth Circuit on review of the Commission's First Report and Order in CC Docket No. 96-98.

TABLE OF CONTENTS

SUMMARY	i
I. INTRODUCTION	2
II. THE COMMISSION SHOULD, WITHOUT RESTRICTIONS, PERMIT CARRIERS TO PROVIDE EXCHANGE ACCESS SERVICE WITH SHARED AND DEDICATED TRANSPORT UNES	3
III. THE REQUESTED RULE CHANGE IS CONSISTENT WITH PRIOR COMMISSION AND COURT DECISIONS	8
CONCLUSION	12

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996)	
)	
Interconnection between Local Exchange)	CC Docket No. 95-185
Carriers and Commercial Mobile Radio)	
Service Providers)	

**COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON THE
FURTHER NOTICE OF PROPOSED RULEMAKING**

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby files its comments on the Commission's Further Notice of Proposed Rulemaking in the above-captioned docket.¹ As discussed below, as a matter of both law and policy, carriers must be able to use unbundled shared and dedicated transport facilities, in conjunction with unbundled switching, to originate and terminate interexchange traffic to customers to whom another carrier provides local exchange service.

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, (CC Docket No. 96-98, FCC 97-295 (Aug. 18, 1997) ("Third Reconsideration Order" and "Further Notice").

I. INTRODUCTION

In the *Third Reconsideration Order*, the Commission, *inter alia*, explained that the Communications Act of 1934, as amended (the "Act") requires incumbent local exchange carriers ("ILECs") to provide requesting carriers, including interexchange carriers ("IXCs"), with access to shared transport facilities between any two ILEC switches as an unbundled network element ("UNE").² In addition, the FCC made clear that ILECs must allow a carrier purchasing shared transport UNEs to use those facilities to carry access traffic for calls that originate from or terminate to customers to whom the purchasing carrier is also providing local exchange service.³ Similar treatment had earlier been accorded dedicated transport in the *Local Competition Order*.⁴

The core of the FCC's decision in the *Third Reconsideration Order* is the obligation imposed upon ILECs by Section 251(c)(3) of the Act to the effect that UNEs are to be made available to requesting carriers singly, or in combination, "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). As the FCC notes, in its *Local*

² *Third Reconsideration Order* ¶¶ 25, 33. Such shared transport UNEs include facilities used by the ILECs to route their own traffic. *Id.* ¶ 22.

³ *Id.* ¶ 38.

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, aff'd in part and vacated in part sub. nom. CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, 1997 WL 403401 (8th Cir., Jul. 18, 1997) (*Iowa Utilities Bd.*), *petitions for rehearing pending*.

Competition Order, it "did not impose any restrictions on the type of telecommunications services that would be provided over network elements."⁵ Nor should the FCC do so now. Rather, for the reasons set forth in detail below, the FCC should find that carriers are entitled to use shared and dedicated transport UNEs to provide exchange access telecommunications services, regardless of whether the carrier also serves the end user as a local exchange carrier.

II. THE COMMISSION SHOULD, WITHOUT RESTRICTIONS, PERMIT CARRIERS TO PROVIDE EXCHANGE ACCESS SERVICE WITH SHARED AND DEDICATED TRANSPORT UNES

The language of Section 251(c)(3) of the Act is clear: any telecommunications carrier may use any UNE that an ILEC is required to offer to provide any telecommunications service.⁶ As the *Third Reconsideration Order* confirms, exchange access service is a "telecommunications service" within the scope of Section 251(c)(3), and shared transport, like dedicated transport, must be offered on a UNE basis.⁷

Nothing in Section 251(c)(3), the Commission's regulations, or the *Local Competition Order* provides any basis for requiring a purchaser of shared or dedicated transport UNEs to

⁵ *Third Reconsideration Order*, ¶ 39; see also *Local Competition Order*, 11 FCC Rcd at 15,679.

⁶ 47 U.S.C. § 251(c)(3). Accord 47 C.F.R. § 51.307(c), 51.309(b). See also *Local Competition Order*, 11 FCC Rcd at 15,679. The FCC, as upheld by the Eighth Circuit decision in *Iowa Utilities Board*, has the authority to identify what UNEs ILECs must make available.

⁷ *Id.* ¶¶ 33, 38-39. The *Local Competition Order* found that ILECs must offer both shared and dedicated transport as UNEs. 11 FCC Rcd at 15,718.

offer services, including exchange access, only to those customers for which it also provides local exchange service. As the FCC stated in the *Third Reconsideration Order*:

In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer. We recognized, however, that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customers unless it offered local exchange service as well as exchange access service over those network elements.⁸

Whether, as a practical matter, a requesting carrier can obtain customers for exchange access service when it does not provide those same customers local exchange service is a matter that should be left to the carriers themselves. To the extent it is not feasible, as a practical matter, for carriers purchasing transport UNEs to offer exchange access service without local exchange service, then regulatory permission from the FCC consistent with the entitlements of Section 251(c)(3) will be rendered nugatory. However, if such provision of exchange access service using transport UNEs *is* practicable, carriers should — and, under Section 251(c)(3), *must* — have the flexibility to provide customers local exchange service, exchange access service, or both. Such flexibility is at the heart of the procompetitive objectives of the Telecommunications Act of 1996. This flexibility can only lead to greater service options for customers, particularly large users that can justify special access connections. Thus, this flexibility will lead to increased competition in the provision of exchange access service and, ultimately, lower interexchange rates for end users. Accordingly, not only does the Act require that carriers be given the opportunity to use ILEC

⁸ *Third Reconsideration Order*, ¶ 60.

transport UNEs to provide *any telecommunications service* to end users, other carriers, or itself, but the public interest demands it.

Moreover, if IXC's purchasing transport UNEs could only use those facilities for exchange access for calls originating from, or terminating to, end users for whom the IXC also provided local exchange service, it would be extremely inefficient from a network perspective. In particular, such carriers would be forced to segregate transport traffic onto two separate trunk groups, one for calls to and from end users for whom they provide local exchange services and another, provisioned as access transport by the LEC or another exchange access provider, for calls to and from end users for whom they do *not* provide local exchange service.⁹ There is no justification under the Act or sound public policy for prohibiting a carrier that can use excess transport capacity on an unbundled dedicated facility as a component of exchange access service from using that capacity to provide exchange access service to another carrier or itself.¹⁰

⁹ The inefficiency of requiring carriers to route transport traffic over separate trunk groups is most egregious on the terminating end of a call. If carriers could use transport UNEs for exchange access whether or not they provide local exchange service to the called party, all terminating traffic could be carried over the UNE to the terminating switch, where the traffic would be switched to the respective loops of the customers. If the use of transport UNEs for exchange access is restricted to end users for which the IXC is also the LEC, IXC's will have to devise entirely new mechanisms within their own network to instruct the routing of terminating traffic between split trunk groups. The additional costs imposed upon IXC's will be entirely unwarranted and will not result in any countervailing benefits. Indeed, the requirement to use separate trunks would only help to preserve non-cost-based access transport charges.

¹⁰ Further, there is no justification for a carrier to have to process and keep track of two bills, rather than one, for essentially identical transport functions and to incur the additional administrative costs that result.

Not only would the effective requirement that carriers utilize separate trunk groups for exchange access be inefficient from a network perspective, it would discriminate among IXCs. Specifically, if IXCs are required to employ separate trunk groups for transport traffic, it would put those IXCs that have made the decision to provide no or limited exchange access service at an artificial competitive disadvantage with respect to those IXCs that have made the business decision to enter the local exchange market now. The Commission's rules, especially where the Act does not expressly require it, should not favor one type of business plan over another for providers of interexchange services. For example, some larger IXCs, such as AT&T and MCI, are making major efforts to enter the local exchange markets. Other IXCs, for various business reasons, have yet to enter the local exchange market.

Under a rule that allows IXCs to use transport UNEs for exchange access only where the carrier is also the local exchange provider to the originating or terminating party, IXCs will have a larger percentage of their access transport traffic carried over UNEs to the extent they have made greater inroads into the local market. Some larger interexchange carriers that, because of their greater overall resources, have a head start in entering the local market will therefore gain a cost advantage over their IXC competitors that have chosen, because of capital constraints or other legitimate business reasons, to enter fewer local markets or to stay out of local markets, at least for now. The latter carriers will still be required to purchase all or most of their access transport from access tariffs at non-UNE rates, while IXCs that have chosen to compete locally to a greater extent will have, in effect, a lower

overall access transport rate as a result of their ability to use UNEs for a larger proportion of their exchange access needs.

While an IXC's decision to enter the local market may certainly have the effect of increasing its attractiveness to a customer that desires one stop shopping, it should not entitle that carrier to an artificial cost advantage over its long-distance competitors in terms of what it pays for access transport as a result of entering the local market. Because each IXC will use the transport facilities to originate or terminate an interexchange call in the same way (and impose similar costs upon the ILEC network), each IXC should have the opportunity to purchase the transport in the same way, regardless of its decision to enter another market.

Furthermore, prohibiting carriers from using UNEs to provide exchange access services independent of the provision of local exchange services is at odds with the procompetitive policies in the FCC's *Expanded Interconnection* proceedings. In CC Docket No. 91-141, the Commission sought to encourage the provision of exchange access services, including entrance facilities and interoffice transport, by competitive access providers. At the time, of course, these competitive access providers — many of whom since have become competitive LECs — did *not* provide local exchange service. Because it served the public interest for multiple carriers to offer competitive access transport when those competitors did not also provide local exchange services, certainly it would serve the public interest for carriers to be able to provide competitive transport services to other carriers as well as themselves using transport UNEs.

Finally, the FCC's goal of economic, cost-based pricing for all telecommunications services — including access services — will be served if carriers purchasing unbundled transport facilities are able to provide any telecommunications service to other carriers or to itself, regardless of who provides the local loop to the customer. As the Commission noted in its *Access Charge Reform Order*, a non-cost-based rate structure can threaten the viability of telephone systems, distort decisions whether to use alternative technologies, encourage uneconomic bypass of the public telephone network, and lead to higher rates for end users.¹¹ Under the current rules, an important factor in the development of cost-based access charges will still be missing. Only if all carriers are free to use a facility at the same cost-based price for the same functional purpose will economically rational pricing be achieved.

III. THE REQUESTED RULE CHANGE IS CONSISTENT WITH PRIOR COMMISSION AND COURT DECISIONS

In the *Further Notice*, the Commission asks whether allowing carriers, without restriction, to use transport UNEs to provide exchange access services would be consistent with an earlier Commission decision regarding the use of unbundled switching to provide exchange access. The *Further Notice* also seeks comments on whether permitting carriers to use transport UNEs in this way is consistent with Eighth Circuit decisions in *Iowa Utilities*

¹¹ *Access Charge Reform*, First Report and Order, CC Docket No. 96-262, FCC 97-158, ¶ 165 (May 16, 1997).

*Board and CompTel v. FCC.*¹² As shown below, allowing carriers to use transport UNEs to provide exchange access service without restriction is not inconsistent with any of these decisions.

The Commission's *First Reconsideration Order* in CC Docket No. 96-98¹³ regarding unbundled switching does not require a different result than that advocated by CompTel.¹⁴ There, the Commission concluded that "as a practical matter," the carrier that purchases unbundled switching obtains the exclusive right to provide, for a particular customer, all features and functions *of the switch* for exchange access and local exchange service for a particular end user.¹⁵ Putting aside the issue whether this is an accurate assessment, transport presents a different matter than local switching.¹⁶ For example, a facilities-based CLEC may purchase an unbundled loop from an ILEC served by an end office where it is collocated. The CLEC may therefore route all traffic to its own switch and network without using the ILEC's switch. It is easy to contemplate, however, how an IXC could use dedicated and/or shared transport facilities of the ILEC to route traffic from its point of

¹² *Further Notice* ¶ 61, nn. 160-61.

¹³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order on Reconsideration*, 11 FCC Rcd 13042 (1997).

¹⁴ *See Further Notice* ¶ 61 (seeking comment on impact of the *First Order on Reconsideration*).

¹⁵ *Id.* at 13,048.

¹⁶ *See Third Reconsideration Order* at ¶ 44 ("shared transport is physically separable from switching.") So, too, is dedicated transport physically separate from switching.

presence to the CLEC switch, for termination. In lieu of paying the ILEC access transport rates for these facilities, it should be able, for the reasons stated above, to purchase transport UNEs.

Second, in contrast with local switching, competitive transport services are being provided by competitive access providers that do not purchase switching *or* unbundled loops. Indeed, in order for IXC's using competitive access providers to obtain the full complement of access services they required, they would often have to combine ILEC switching with competitively provided transport. Carriers should be permitted to do the same with transport provided on a UNE basis.

Third, the dedicated portions of the switch, such as the line card, led the FCC to conclude that carriers not purchasing the loop and unbundled switching were "effectively preclud[ed] . . . from using unbundled switching to substitute for switched access services where the loop is used to provide both exchange access to the requesting carriers and local exchange service by the incumbent LEC."¹⁷ However, the switch has the capability to connect the loop to a multiplicity of lines and trunks, *i.e.*, transport facilities. Conversely, a variety of lines and trunks can all connect to a single local loop through the switch. Thus, even assuming that "a competing provider orders the unbundled basic switching element for a particular customer line,"¹⁸ it does not follow that interswitch transport must be inextricably

¹⁷ *First Reconsideration Order* at 13,049.

¹⁸ *Id.* at 13,049.

tied to a particular customer line. Indeed, both shared and dedicated transport facilities, as a rule, carry traffic originating from or terminating on numerous lines.

Allowing carriers to use transport UNEs for exchange access would not be inconsistent with Eighth Circuit decisions circumscribing FCC jurisdiction over the pricing for unbundled network elements. As the Eighth Circuit noted in *Iowa Utilities Board*, the FCC clearly has jurisdiction over both access charges and what UNEs must be made available to requesting carriers, but *not* over pricing for UNEs. Although the Eighth Circuit stated that interconnection and unbundled access are distinct from exchange access, *Iowa Utilities Board*, n. 20, it did so only to highlight its conclusion that the FCC had jurisdiction over the rates for interstate exchange access, but not UNEs and interconnection. Nothing advocated by CompTel herein would require the FCC to cross that line. Indeed, in the *Third Order on Reconsideration*, the Commission recognized that it could require ILECs to offer shared transport as a UNE to carriers who would use the element to provide themselves exchange access without intruding upon state jurisdiction over pricing.¹⁹ What CompTel advocates would not require the FCC to go any further.²⁰

¹⁹ *Third Reconsideration Order* ¶ 30.

²⁰ In *CompTel v. FCC*, the Eighth Circuit upheld the Commission's *interim* pricing rules on access carrier common line charge and transport interconnection charges until such time as the FCC's new universal service rules were to take effect. 117 F. 3d at 1074. The action here does not affect those access charge elements. Thus, the Commission action urged by CompTel herein is not at odds with the Eighth Circuit's decision.

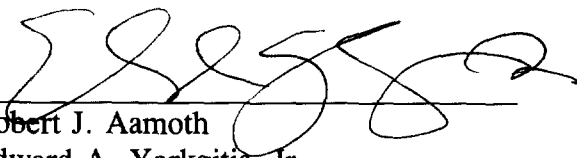
CONCLUSION

For the foregoing reasons, the Commission should modify its rules to make clear that carriers may utilize shared and dedicated transport purchased from ILECs on a UNE basis for providing exchange access services to other carriers or themselves regardless of whether they provide local exchange services to end users.

Respectfully submitted,

THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION

Genevieve Morelli
Executive Vice President and
General Counsel
THE COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION
1900 M Street, N.W., Suite 800
Washington, DC 20036
(202) 296-6650



Robert J. Aamoth
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600

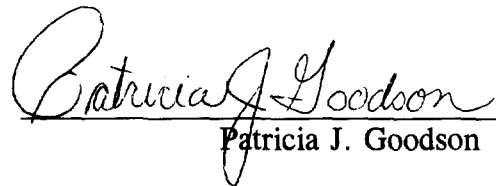
October 2, 1997

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Comments were served by hand delivery on this 2nd day of October, 1997, to the following parties:

Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036


Patricia J. Goodson